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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re T.J., a Person Coming Under the  
Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

W.J.,

Defendant and Appellant.

B209265

x-ref. B197352

(Los. Angeles County  
Super. Ct. No. CK 64284)

APPEAL from orders of the Superior Court of Los Angeles County.

Steven L. Berman, Juvenile Court Referee. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County  
Counsel and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

W.J. appeals from orders of the juvenile court changing his visits with his daughter T.J. from unmonitored to monitored and terminating his family reunification services. We affirm.

### **FACTS AND PROCEEDINGS BELOW**

This family came to the attention of the DCFS in July 2006 when police arrested W.J. for possession of child pornography in the family home. Although W.J. contended a man named Gary, who he allowed to stay in the home for a period of time, had placed the pornography on the computer, W.J. entered a plea of nolo contendere to the charge of violation of Penal Code section 311.11(a) on January 8, 2008. W.J.'s daughter T.J., born January 2002, was not among the children depicted in the sexually explicit photographs. After further investigation, however, the DCFS filed a petition under Welfare and Institutions Code section 300, subdivisions (b) and (d)<sup>1</sup> alleging W.J. had sexually abused T.J. and that W.J.'s possession of child pornography in the home placed T.J. at risk of physical and emotional harm and sexual abuse.

In January 2007, the juvenile court sustained the petition, finding that W.J. "possessed an assortment of child pornography in [his] computer in the child's home within access of the child" and that "[o]n numerous occasions, the child . . . was sexually abused by the father [including] having the child fondle his penis and the father . . . touched the child in a lewd manner." The court allowed T.J. to remain in the custody of her mother (who no longer lived with W.J.) and ordered reunification services for W.J. including parent education, individual counseling, services to address addiction to child pornography and child sexual abuse awareness. W.J. was granted monitored visits with T.J.<sup>2</sup>

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

<sup>2</sup> We affirmed the court's orders in an unreported opinion. (*In re T.J.* (Nov. 26, 2007, B197352) [nonpub. opn.] )

At the 12-month review hearing in September 2007 the court admitted a report from the DCFS Child Sexual Abuse Program (CSAP) stating that W.J. had progressed from the first phase of the program (learning the dynamics of child sexual abuse) to the second phase (learning self-control, maintaining limits and boundaries), and that he had excellent attendance and participated appropriately in group sessions.

At the same hearing the court received a report from W.J.'s individual therapist, Lynn Ingber, who stated W.J. had been regularly attending therapy for six months on a weekly basis. After summarizing the nature of their sessions and W.J.'s progress the therapist expressed the opinion that "he has never been inappropriate with his daughter" and that he "shows no evidence of the characteristics of a molester and to so label him would be a mistake. He is not a manipulative, controlling, authoritarian person, but rather is a sensitive, insightful, and empathetic man. Also, at 45 years of age, he has no history of molestation or related activities." Ingber acknowledged that W.J. "continues to deny any direct wrongdoing and maintains that the illicit material on his computer was put there by a friend" and that he "emphatically stated that he has never touched his daughter inappropriately." Ingber recommended that W.J. be awarded "unsupervised reunification and full parental rights with his daughter."

Based on the recommendations of the DCFS and W.J.'s individual therapist, the court modified W.J.'s visitation with T.J. to unmonitored visitation in a public place. The court stated that T.J.'s mother could "be in the area in case the child has to go to the bathroom."

At the 18-month review in March 2008 the DCFS reported that W.J. had been expelled from the CSAP sexual abuse counseling program "due to new policies requiring that clients making little progress be terminated." The counselors at CSAP deemed W.J. to be making "little progress in that he never admitted to any inappropriate sexual conduct." The report also noted that W.J. "continues to deny the sustained allegations despite pleading guilty to related criminal charges on 01/08/08. Father now must

maintain [Penal Code section] 290 registration as a sex offender.”<sup>3</sup> The report recommended that W.J. continue to have unmonitored visits with T.J. in public places but that reunification services be terminated because W.J. had failed “to make any progress toward acknowledging and addressing the issues that resulted in [T.J.’s] detention.” The court continued the review proceedings to April 2008 for a contested hearing on the issue of termination of reunification services and thereafter continued the proceedings to May 2008 for the production of a further report from CSAP.

In May 2008, the DCFS filed a petition under section 388 to change W.J.’s visits from unmonitored to monitored by a DCFS-approved monitor. The petition alleged the change in circumstances that necessitated this modification was W.J.’s “terminat[ion] from his CSAP program because of his continued denial of inappropriate touching and child pornography.” The petition further alleged that the change would be in T.J.’s best interests because monitored visits “would protect the child from the father’s sexual abuse and would insure that the child is unavailable to the father for further abuse.”

The court conducted a combined hearing on the petition to modify visitation and the termination of family reunification services in May 2008. The court admitted into evidence the March and April 2008 reports from the DCFS and new written reports by Daphne Nieman-Cohen, the CSAP Program Coordinator, Ann Hailey, a social worker and other DCFS personnel, all of whom confirmed that W.J. refused to acknowledge that he put the child pornography on his computer and refused to admit that he engaged in inappropriate touching of T.J.

In addition to submitting a written report, Nieman-Cohen testified in support of monitored visitation. She stated that she was a licensed psychotherapist with a master’s degree in educational psychology and counseling and had been working in the CSAP program for approximately two years. Nieman-Cohen confirmed the statements in her report regarding W.J.’s refusal to accept responsibility for the pornography on his

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<sup>3</sup> “Related criminal charges” refers to W.J.’s plea of nolo contendere to possession of child pornography.

computer and the sexual abuse of his daughter. She testified that in her opinion W.J. posed a risk to his daughter “because . . . until there’s an understanding about sexual molestation and the behavior of the child and himself, in relation to the sexual molestation allegations, there’s still a risk.” She further testified that because “we don’t know whether there’s going to be any further . . . inappropriate behavior . . . I would rather err on the side of the child.”

Hailey also testified in support of monitored visits. She stated that she was concerned about an incident reported by T.J.’s maternal aunt who stated that T.J. told her that one time when she was at the mall with her dad she had to go to the bathroom, so her dad took her into the men’s restroom. T.J. was six years old at the time. There was no allegation that W.J. did anything inappropriate in the bathroom and Hailey acknowledged “it sounded like [he] was put in a bad position [and] had no choice but to take her to the restroom . . . .”<sup>4</sup> Like Neiman-Cohen, Hailey believed that until W.J. was willing to acknowledge and deal with his past behavior he and T.J. should never be “put in a position to be alone where anything could happen.” In Hailey’s opinion the previous decision to allow W.J. unmonitored visits was incorrect and “put [T.J.] in jeopardy.”

In opposition to the proposed modification, W.J. pointed to the statement in the most recent DCFS report that T.J. is a happy, healthy, well-adjusted girl who continues to be excited about her visits with her father and consistently requests more contact and to his psychotherapist’s recommendation that he “be given full parental privilege” because he has demonstrated “sensitivity, knowledge, insight and the understanding that is necessary for effective parenting.”

The court granted the modification petition and ordered that W.J.’s future visits with T.J. be monitored by someone approved by the DCFS. The court found that W.J.’s

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<sup>4</sup> Later, Hailey testified the aunt told her that W.J. could have taken T.J. to a “coed restroom for parents with children.” The aunt testified earlier in the hearing, however, that she “probably” did not make that statement even though she knew there was such a bathroom in the mall. There was no evidence that W.J. knew about this coed bathroom.

refusal to acknowledge that he abused T.J. and that he viewed child pornography, the “bathroom incident,” and the requirement that he register as a sex offender constituted changes in circumstances affecting visitation. The court further found that monitored visits were in T.J.’s best interests because there were reports of W.J. and the mother arguing, W.J. had to take T.J. to the bathroom with him and W.J. is now required to register as a sex offender. The court also terminated W.J.’s family reunification services.

## **DISCUSSION**

### **I. THE CHANGE TO MONITORED VISITS**

#### **A. Standard of Review**

The DCFS brought its petition to modify the visitation order under section 388 which provides in relevant part: “Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition shall . . . set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order . . . .” The court may grant the petition if the petitioner shows a change in circumstances “and it appears that the best interest of the child may be promoted by the proposed change of order . . . .” (Cal. Rules of Court, rule 5.570, subd. (e).) A change in visitation requires a showing by a preponderance of the evidence “that the child’s welfare requires such a modification.” (Cal. Rules of Court, rule 5.570, subd. (h)(1).)

Whether a change in circumstances justifies a modification of a previous order is a matter committed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of that discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Discretion is abused if the justification for the modification is not supported by substantial evidence. (*Los Angeles County Dept. of Children etc. Services v. Superior Court* (1998) 63 Cal.App.4th 1299, 1306.) We conclude that substantial evidence

supported the modification of the visitation order and, therefore, that the trial court did not abuse its discretion.

### **B. Sufficiency of the Evidence—Change of Circumstances**

The court found three changed circumstances after it had ordered unmonitored visitation: (1) W.J. continued to refuse to admit that he viewed child pornography on his computer and refused to acknowledge that he had sexually abused T.J.; (2) the “bathroom incident” showed that “the original order of unmonitored visitation was wrong,” and (3) W.J. was now required to register as a sex offender.

Each of these events adequately supported the trial court’s finding of change in circumstances.

W.J. entered a plea of nolo contendere to the child pornography charge in January, 2008. His plea constituted an admission. (*Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 285, review denied [A plea of nolo contendere to an offense punishable as a felony, regardless of whether it is ultimately so punished, is admissible as a party admission in a civil action based upon or growing out of the act upon which the criminal prosecution is based].) Although it is true that, during these dependency proceedings, W.J. consistently denied putting the child pornography on his computer and molesting T.J, and it is also true that the court was aware of W.J.’s denials when it approved unmonitored visits in September 2007, his conviction of the pornography charge and the requirement that W.J. register as a sex offender did constitute changes in circumstances.

The bathroom incident also represents a change in circumstances. The unmonitored visits were ordered to be in a public place. A closed stall in a public bathroom cannot be reasonably regarded as a public place.

The DCFS also correctly argues that even if the events cited by the court do not constitute changed circumstances for purposes of section 388, they do constitute sufficient evidence to support the court’s finding that its “original order of unmonitored visitation was wrong” and “did not work” and therefore needed to be changed.

A dependency court has the inherent power to modify an order erroneously, inadvertently or improvidently granted. (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 110.) In exercising that power, however, the court still must balance the best interests of the child against the parent's fundamental interest in parenting his child. (*Id.* at p. 118.) The evidence supports the court's implied finding that the unmonitored visitation order was improvidently granted, and the trial court's express finding that a change from unmonitored to monitored visits was in T.J.'s best interest.

### **C. Sufficiency of the Evidence—Best Interests of T.J.**

There was sufficient evidence to show that a change to monitored visits was in T.J.'s best interests.

Although the child appeared to enjoy her time with her father, by taking the child into the restroom, as discussed *ante*, W.J. had violated the court order by not limiting the visit to a public place. The trial court could reasonably conclude that this conduct endangered the child's safety and well-being. This conclusion was supported by the opinions of two social workers, Hailey and Nieman-Cohen, who testified that until W.J. acknowledged his behavior and took responsibility for his actions he would pose a risk to T.J. In Hailey's expert opinion, the September 2007 order allowing unmonitored visits was a mistake. These opinions further constitute substantial, credible evidence that a change from unmonitored to monitored visits would be in T.J.'s best interests.

## **II. TERMINATION OF W.J.'S REUNIFICATION SERVICES**

At the 18-month review hearing (combined with the DCFS petition to modify visitation), the court found that the DCFS had provided reasonable reunification services and terminated reunification services.<sup>5</sup>

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<sup>5</sup> The DCFS argues W.J. waived any issue regarding termination of family services because he told the trial court that he was not "contesting the continuation of jurisdiction" nor arguing for the custody of T.J. "*at this time.*" We construe W.J.'s statements as reserving the right to contest custody and continued jurisdiction in the future and thus the provision of reunification services remained relevant.

W.J. contends that he did not receive reasonable reunification services because neither of his counseling programs addressed his possession and viewing of child pornography, one of the grounds on which the petition was sustained. (See *In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777 [reunification services “must be designed to eliminate those conditions which led to the juvenile court’s jurisdictional finding”].) This contention fails because the record contains substantial evidence that child pornography counseling was provided to W.J. as part of the CSAP program.

W.J. next contends that the court erred in upholding his expulsion from sexual abuse counseling on the ground he refused to admit to possessing child pornography and molesting T.J. He maintains “confession dilemma” prevented him from taking responsibility for these transgressions.

“Confession dilemma” is the term used by the court in dictum in *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1752, to describe the position of a parent “who is *falsely* accused of sexually molesting his or her child. If the parent denies what any decent person must regard as a horrible act, that denial itself . . . may end up preventing reunification.” (Original italics.)<sup>6</sup> W.J. contends that he was faced with this dilemma—the DCFS used his refusal to admit to committing “horrible acts” that he did not commit as an excuse to terminate his reunification services. We reject this argument because in this case the “dilemma” is of W.J.’s own making.

We do not deny the “undeniable [fact] that false accusations of child molestation do happen.” (*Blanca P. v. Superior Court, supra*, 45 Cal.App.4th at p. 1753.) Substantial evidence, however, did support the court’s finding of molestation as we explained in upholding the court’s factual findings in our prior opinion in this matter. (See fn. 2, *ante.*) But even if T.J.’s testimony was false, exaggerated, or misinterpreted, the evidence supporting the trial court’s finding that W.J. knowingly possessed child

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<sup>6</sup> For further discussion of the “confession dilemma” in dependency cases see Weinstein, And Never The Twain Shall Meet: The Best Interests Of Children And The Adversary System (1997) 52 U. Miami L. Rev. 79, 115, fn. 114.

pornography on his home computer was more than substantial and he did plead nolo contendere to such possession. In upholding the termination of W.J.'s reunification services the trial court could reasonably conclude that W.J. was unwilling to openly and honestly address his behavior.

**DISPOSITION**

The orders modifying W.J.'s visitation with T.J. from unmonitored to monitored and in terminating W.J.'s family reunification services are affirmed.

NOT TO BE PUBLISHED.

WEISBERG, J.\*

I concur:

MALLANO, P. J.

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\* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ROTHSCHILD, J., Concurring and Dissenting.

I concur in the majority's affirmance of the order terminating W.J.'s reunification services. I dissent from the affirmance of the order modifying T.J.'s visitation with his daughter from unmonitored to monitored.

Whether the modification is tested under Welfare and Institutions Code section 388 or the court's sua sponte authority to modify a previously granted order, nothing that occurred after the court made the order for unmonitored visits (original order) warranted changing visitation. Indeed, the events after unmonitored visitation began confirmed that the court correctly decided the case when it made the original order. During the eight months between the two orders, there were no problems with visitation, it continued to be a positive experience for the child, the child thrived, and wanted to spend more time with her father. The facts cited by the court justifying the change were either already known and evaluated by the court when it made its original order or lacked a sufficiently substantial connection to the well being of the child to warrant a change. The court had found the charges of viewing child pornography true before it made the original order, so father's pleading nolo contendere and thus being required to register as a sex offender could not be a basis for a change in the visitation order. His denial of the charges against him was likewise known to the court when it made the original order. The single "bathroom" incident, on which the majority appears to place great weight, was in no way relevant to the factors which gave rise to DCFS's intervention since there was no evidence that W.J. took T.J. to the bathroom for any reason other than she had to use the facilities. Even the DCFS worker conceded that in taking the child to use the men's room, W.J. "may have not had a choice."

ROTHSCHILD, J.